

Webster

IN THE COURT OF COMMON PLEAS FOR  
LYCOMING COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH

v.

PHILLIP BROOKS,  
Defendant

No.: 02-11,104

.....

OPINION AND ORDER

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Defendant in the above-captioned case filed an Omnibus Pre-Trial Motion on December 9, 2002, asserting his Motion to Dismiss for Failure to File a Timely Complaint, Motion to Suppress Evidence for Failure to Obtain Warrant Prior to Search and Arrest, and a Motion to Dismiss Based Upon Inconsistent Information. A hearing was held on July 28, 2003 and the Court finds the following facts.

On January 9, 2002, the Williamsport Bureau of Police arrested the Defendant after he sold marijuana to a confidential informant (CI). Before the transaction, the CI was strip-searched by officers and provided with \$20 in pre-recorded funds. The CI was then sent into the Defendant's apartment and returned with 1/8 oz. of marijuana and \$5.00 in change. The CI was under surveillance as he walked to and from the apartment. When he returned, the CI indicated that he had made his purchase from the Defendant, whom he knew as "Phil". He described the Defendant as the sole occupant of the apartment and said he was wearing a white T-shirt and jeans. The arrest team was then signaled to enter the apartment and

arrested the Defendant. While he was still in the apartment, the officers requested and received the Defendant's written consent to search the premises. The search produced the Defendant's wallet with his identification and the pre-recorded buy money. Additionally, scales, money, and a box or safe were found in the Defendant's bedroom. The Defendant was transported to City Hall where the officers solicited his cooperation in naming others involved in buying and selling drugs. The Defendant agreed to assist them, but when he failed to follow through the officers filed the present charges against him on June 6, 2002. The Defendant claims that he was intimidated by threats made by the officers. He alleges they made comments to the effect that the Defendant's small frame would make him a target of other, larger men in the prison. He further claims that the taunting officers carried small hatchets with them and threatened to "break up the place" if the Defendant did not do as they wished. He asserts that he gave his consent to search only those areas of the apartment to which he was allowed access and agreed to cooperate with the officers only because the threatening remarks scared him.

#### **Motion to Dismiss for Failure to File a Timely Complaint**

Pennsylvania Rule of Criminal Procedure 150 provides that "(a) defendant shall not be discharged nor shall a case be dismissed because of a . . . defect in the procedures of this chapter, unless the defendant raises the defect before the conclusion of the preliminary hearing and the defect is prejudicial to the rights of the defendant." See also Commonwealth v.

Wolgemuth, 737 A.2d 757, (Pa.Super. 1999); Commonwealth v. La Belle, 531 Pa. 256, 612 A.2d 418 (1992); Commonwealth v. Schimelfenig, 361 Pa. Super. 325, 522 A.2d 605 (1987). The Courts have also held that "similar rules of procedure, containing the same 'mandatory' language, should not be enforced with dismissal of charges in the absence of prejudice to the defendant." Commonwealth v. Revtai, 516 Pa. 53, 532 A.2d 1 (1987), citing Commonwealth v. Young, 318 Pa.Super. 538, 465 A.2d 684 (1983) (no discharge where defendant failed to show prejudice by delay in arraignment); Commonwealth v. Lee, 294 Pa.Super. 495, 440 A.2d 574 (1982) (absent showing of prejudice, no dismissal for delay between time of arraignment and trial); Commonwealth v. Andrews, 285 Pa.Super. 100, 426 A.2d 1160 (1981) (no discharge for delay between the filing of information and arraignment absent showing of prejudice); Commonwealth v. DeCosey, 246 Pa.Super. 412, 371 A.2d 905 (1977) (discharge not warranted for delay in conducting preliminary hearing where defendant was not incarcerated, failed to timely object and failed to show prejudice); Commonwealth v. Maxwell, 329 Pa.Super. 409, 478 A.2d 854 (1984) (defendant must show prejudice by delay between time of incident and arrest to support claim of due process violation). In this case, the Defendant has failed to present any evidence showing that he was prejudiced by the delay between the date of the incident, January 9, 2002, and the date the complaint was filed in his case, June 6, 2002.

**Motion to Suppress Evidence for Failure to Obtain Warrant Prior to Search and Arrest**

Defendant next claims that all evidence found within his apartment should be suppressed because the police entered the property without a search warrant or arrest warrant. He asserts that there was no necessity for a warrantless search and argues that there is no good faith exception applicable here for the failure to obtain a warrant. The Commonwealth counters that a felony arrest was made based upon the probable cause possessed by the officers at the time they made contact with the Defendant, and that exigent circumstances existed to make that arrest without a warrant. Commonwealth witnesses testified that the premises were secured, but no search was begun until after they had obtained the written consent of the Defendant to conduct a search.

"Where a motion to suppress physical evidence has been filed, 'the Commonwealth [has] the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights.' The Commonwealth is required to establish the admissibility of the challenged evidence by a preponderance of the evidence." Commonwealth v. Strickland, 707 A.2d 531 (Pa.Super. 1998), citing Commonwealth v. Govens, 429 Pa.Super. 464, 632 A.2d 1316 (1993) (en banc). See also Commonwealth v. DeWitt, 530 Pa. 299, 608 A.2d 1030 (1992); Commonwealth v. Frombach, 420 Pa.Super. 498, 617 A.2d 15 (1992).

"As a general rule a search or seizure without a warrant is deemed unreasonable for constitutional purposes." Commonwealth v. Govens, 429 Pa. Super. 464, 632 A.2d 1316 (1993), citing Commonwealth v. Holzer, 480 Pa. 93, 389 A.2d 101 (1978), citing Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). "Absent consent or exigent circumstances, private homes may not be constitutionally entered to conduct a search or to effectuate an arrest without a warrant, even where probable cause exists." Commonwealth v. Santiago, 1999 PA Super 196, 736 A.2d 624 (Pa. Super. 1999).

The exigent circumstances exception to the warrant requirement recognizes that "some situations present a compelling need for instant arrest, and that delay to seek a warrant will endanger life, limb, or overriding law enforcement interests. In these cases, our strong preference for use of a warrant must 'give way to an urgent need for immediate action.'" United States v. Alvarez, 810 F.2d 879, 881 (9<sup>th</sup> Cir. 1987), quoting United States v. Blake, 632 F.2d 731, 733 (9<sup>th</sup> Cir. 1980). However, before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. Santiago, 736 A.2d at 631.

The Pennsylvania Supreme Court has identified the following factors to be considered in determining whether exigent circumstances exist: First, whether a grave offense is involved, particularly one that is a crime of violence. Second, whether the suspect is reasonably believed to be armed.

Third, that not only the minimum probable cause required for a warrant exists, but a clear showing of probable cause, including 'reasonably trustworthy information,' to believe that the suspect committed the crime involved. Fourth, whether there is strong reason to believe that the person sought is in the premises. Fifth, whether there is a likelihood that the suspect will escape if not quickly caught. Sixth, whether the entry is made peaceably. "(T)he fact that entry was not forcible aids in showing reasonableness of police attitude and conduct. The police, by identifying their mission, give the person an opportunity to surrender himself without a struggle and thus to avoid the invasion of privacy involved in entry into the home." Santiago, 736 A.2d at 632. See also Commonwealth v. Williams, 483 Pa. 293, 298 – 299, 396 A.2d 1177, 1179 – 1180 (1978), cert. den., 446 U.S. 912, 100 S.Ct. 1843, 64 L.Ed.2d 266 (1980). Further, a "reasonable belief by police that evidence is likely to be destroyed will give rise to exigent circumstances sufficient to justify a warrantless entry into a private residence." Commonwealth v. Ariondo, 397 Pa. Super. 364, 374, 580 A.2d 341, 346 (1990).

In this case, the Court finds that although the officers did not have an arrest warrant at the time that they made contact with the Defendant, exigent circumstances did exist to excuse the warrant requirement. The officers had clear probable cause to believe that the Defendant had just committed a felony. The felony involved the sale of drugs to a confidential informant, creating the possibility that evidence of the crime was likely to be

destroyed. The arrest made by the officers was constitutionally valid. Similarly, the officers did not possess a search warrant for the premises at the time they conducted their search. They did, however, have written consent for the search from the defendant, as the defendant himself acknowledges.

Voluntary consent to search is an exception to the general rule that a warrantless search of a residence is per se unreasonable. See Commonwealth v. Gibson, 536 Pa. 123, 638 A.2d 203, 206 (1994). Here, the Defendant claims that his consent was not voluntary but was instead coerced by the officers at the scene. When evaluating voluntariness of consent, the totality of the circumstances must be evaluated.

Commonwealth v. Strickler, 563 Pa. 47, 757 A.2d 884 (2000). There is no hard and fast list of factors for evaluation of voluntariness, however, some considerations include: "1) the defendant's custodial status; 2) the use of duress or coercive tactics by law enforcement personnel; 3) the defendant's knowledge of his right to refuse to consent; 4) the defendant's education and intelligence; 5) the defendant's belief that no incriminating evidence will be found; and 6) the extent and level of the defendant's cooperation with the law enforcement personnel." Commonwealth v. Gillespie, 821 A.2d 1221 (Pa. 2003), citing Commonwealth v. Cleckley, 558 Pa. 517, 738 A.2d 427, 433 n.7 (Pa. 1999). The mere presence of police is not coercion. Gillespie, 821 A.2d. at 1225.

In this case, the Defendant was in custody at the time that he consented to the search of his apartment. When presented with the consent form, he was advised of his right to refuse consent. Defendant signed the form and exhibited a great deal of cooperation with the officers, agreeing to consider providing them with information regarding others who might be involved in transactions with drugs. The Court finds that the testimony of the Defendant that he was coerced into signing the consent to search and to offer to provide assistance to the officers regarding others involved in drug transactions is not credible. Consequently, this Court finds that the Defendant's consent to search his apartment was valid and that his consent excuses the warrant requirement for the search. The items found during the search will not be suppressed.

#### **Motion to Dismiss Based Upon Inconsistent Information**

The final motion brought by the Defendant is that the Court dismiss his case with prejudice because the affidavit of probable cause and the criminal information filed in his case contain two different alleged offense dates. Defendant asserts that because of the error, he cannot effectively defend himself against these charges. This issue was resolved at the time of the hearing on this matter. The Court finds that the Defendant was placed on notice of the correct date at the preliminary hearing. Accordingly, the Court will amend the information to reflect the correct date of the alleged offense as January 9, 2002.

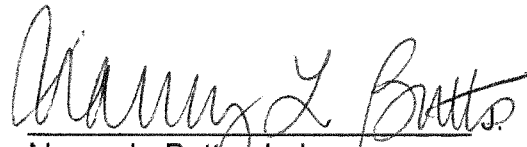


ORDER

AND NOW, this 20th day of August, 2003, for the reasons set forth above, it is ORDERED and DIRECTED that Defendant's Omnibus Pre-Trial Motion is DISMISSED.

It is further ORDERED AND DIRECTED the criminal information in this case IS AMENDED to reflect the correct date of the alleged offense, **January 9, 2002.**

By the Court,

  
Nancy L. Butts, Judge

xc: DA (RF)  
John Piazza, Esquire  
✓ Hon. Nancy L. Butts  
✓ Diane L. Turner, Esquire  
Gary Weber, Esquire